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91-1630

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ROBERT E. KING,

Petitioner,

v.

NCNB TEXAS NATIONAL BANK, SUCCESSOR IN INTEREST TO FIRST REPUBLICBANK DALLAS, SUCCESSOR IN INTEREST TO INTERFIRST BANK DALLAS, N.A.

AND

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR FIRST REPUBLICBANK DALLAS, N.A.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal common law, as defined in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), applies to claims or defenses asserted under the provisions of the Bank Tying Act, 12 U.S.C. §§ 1971-1978, and thus deprives a party of express federal remedies for coercive, illegal banking activity.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert E. King petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is unreported. The order and judgment of the district court (App., *infra*, 10a-21a and 22a-23a, respectively) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1991. On February 28, 1992, the Honorable Antonin Scalia, Associate Justice, entered an order extending the time for filing a petition for writ of certiorari in this matter until and including April 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 12 U.S.C. § 1972 provides in pertinent part:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement –
>
> * * *
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a

> condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

And Title 12 U.S.C. § 1975 provides in pertinent part:

> Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefore in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

1. From 1980 through 1983, petitioner was the controlling shareholder of Glenn Brothers Trucking Company, Inc. ("Glenn Brothers") and Tulsa Trailer and Body, Inc. ("Tulsa Trailer").[1] Petitioner was a resident of Tulsa,

[1] The trial court held that respondents were entitled to summary judgment both as to the affirmative claims against petitioner premised upon relevant loan documents and as to petitioner's defenses and counterclaims based upon duress and violations of the Bank Tying Act, 12 U.S.C. §§ 1971-78 (the "Act"), inter alia. Respondents did not take issue with any of the facts asserted by petitioner below; they instead sought to bar petitioner's claims and defenses on legal grounds only. Many of these facts are also found in the court of appeals' *per curiam* decision. App., *infra*, 1a-9a. There is thus no controversy as to the facts described in the Statement.

Oklahoma, and Tulsa Trailer was a successful truck trailer franchise based in Tulsa. Tulsa Trailer had two lenders in Oklahoma: First National Bank & Trust Company of Oklahoma City and City Bank & Trust in Tulsa (collectively, "the Oklahoma Banks").

2. In 1980, InterFirst Bank, Dallas ("InterFirst"), then known as First National Bank in Dallas, approached petitioner in an attempt to procure petitioner's banking business. App., *infra*, 2a. InterFirst succeeded in cultivating petitioner's banking business, and subsequently financed petitioner's purchase and restructuring of Glenn Brothers. *Id.* As a part of this transaction, petitioner executed guarantees of Glenn Brothers' existing obligations to InterFirst. In addition, in connection with the restructuring, InterFirst required that petitioner accept a former InterFirst employee, Garland Head, as a "turnaround" expert at a salary of $100,000.00 annually. *Id.*[2]

3. InterFirst required that petitioner execute a $1,065,000.00 promissory note, which represented previous advances to Glenn Brothers, by falsely telling him that he was already liable on Glenn Brothers' debt. *Id.* Petitioner had in fact only authorized $600,000.00 of this amount to be advanced to Glenn Brothers, the balance

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[2] After Head, through his mismanagement and self-dealing, had virtually ruined Glenn Brothers and had significantly increased its debt to InterFirst, Glenn Brothers was ordered shut down by petitioner. App., *infra*, 2a. Subsequently, however, upon the instruction of Head, InterFirst extended further credit to Glenn Brothers without petitioner's knowledge. *Id.* InterFirst did so because it was undersecured at the time and it believed Head's claim that a further infusion of capital would turn the company around and prevent bank losses. *Id.*

being incurred at the direction of Head, without petitioner's knowledge, and following petitioner's notification of InterFirst that no further funds were to be advanced to Glenn Brothers. As part of InterFirst's requirement that petitioner execute the $1,065,000.00 note, InterFirst demanded that petitioner cease doing business with any bank other than InterFirst, and required that petitioner transfer all of the banking business of Tulsa Trailer from the Oklahoma Banks to InterFirst. *Id.* In exchange for moving his banking business from the Oklahoma Banks to InterFirst, InterFirst agreed not to call any of petitioner's guarantees of Glenn Brothers' debt, and to extend those debts and guarantees. App., *infra*, 3a. The facts underlying petitioner's claims and defenses based upon tying violations were memorialized in an internal InterFirst memorandum. This memorandum, which was part of InterFirst's files, described the basic terms of the agreement which petitioner was coerced to enter.

4. During the entire time that petitioner dealt with InterFirst, the Oklahoma Banks were InterFirst's competitors. App., *infra*, 5a. Indeed, InterFirst opened an office in Tulsa to make loans in Oklahoma specifically to compete with, and take business away from, the Oklahoma Banks and others.

5. In connection with the $1,065,000.00 note, InterFirst agreed to loan additional funds to Tulsa Trailer, and a successor of Glenn Brothers. The Oklahoma Banks subsequently froze lines of credit maintained by petitioner at those banks on behalf of Tulsa Trailer and Glenn Brothers. Following petitioner's compliance with InterFirst's demands, and contrary to InterFirst's representations,

InterFirst contended that the $1,065,000.00 loan was in default and that petitioner was immediately obligated to pay the principal and interest due on the note.[3]

6. On September 29, 1983, InterFirst filed a complaint in the Northern District of Texas seeking to recover the balance due on petitioner's notes and related guarantees.[4] On August 22, 1984, September 14, 1984, and March 26, 1986, InterFirst filed motions for summary judgment as to, respectively, its claims against petitioner and petitioner's counterclaims and amended counterclaims against InterFirst. In view of the amended counterclaims, the second Rule 56 motion was rendered moot. The remaining two motions were denied on May 15, 1987, when the district court held that petitioner's claims and defenses presented material issues of fact for trial. Following the district court's denial of InterFirst's summary judgment motions, InterFirst merged with RepublicBank Dallas, to form First RepublicBank Dallas. App., *infra*, 3a. On July 29, 1988, First RepublicBank was closed by the Federal Deposit Insurance Corporation ("FDIC"). App., *infra*, 12a. The FDIC was appointed receiver of First RepublicBank and established a bridge bank (JRB Bank, N.A.) to assume First RepublicBank's deposits and certain of its assets and liabilities. JRB Bank was subsequently acquired by NCNB Corp. and was renamed

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[3] As a result of InterFirst's conduct described above, Tulsa Trailer lost its credit relationship at a crucial time of expansion and the entire Tulsa Trailer business was ruined. App., *infra*, 6a.

[4] Aside from the $1,065,000.00 note at issue, petitioner executed three other notes to InterFirst on behalf of his companies.

NCNB Texas National Bank ("NCNB"). The FDIC entered into a purchase and assumption agreement with NCNB and acquired petitioner's guarantees and notes.

7. NCNB was allowed to intervene, and on September 22, 1989, filed a complaint against petitioner containing the same claims as those found in InterFirst's earlier complaint. In his answers and counterclaims to the respondents' complaints, petitioner asserted various defenses and counterclaims including his claims under the Act, and for duress. On March 2, 1990, the FDIC filed a motion for summary judgment. The FDIC's motion contended that petitioner's claims and defenses based upon duress and violations of the Act were barred by *D'Oench*. NCNB thereafter filed a motion for summary judgment which adopted the FDIC's motion. In response to those motions, petitioner submitted an affidavit, and other evidence, which detailed facts establishing the elements of economic duress and tying claims under the Act. The trial court granted respondents' motions for summary judgment on the grounds that petitioner's claims and defenses of duress and violations of the Act were barred by *D'Oench*, as well as the federal holder in due course doctrine. App., *infra*, 16a. In an unreported opinion, the Fifth Circuit affirmed. The court of appeals ruled that petitioner's claims and defenses were based solely upon an unrecorded agreement and could not be asserted

against the FDIC or its transferees.[5] The court of appeals' decision was based upon the *D'Oench* doctrine, and it did not reach the question of whether petitioner's claims and defenses were alternatively barred by the federal holder in due course doctrine. App., *infra*, 5a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that petitioner's claim under the Act was barred by the *D'Oench* doctrine. This is the first decision by a court of appeals addressing the effect of the *D'Oench* doctrine on a claim under the Act. That holding squarely conflicts with decisions of other courts, which have held that claims based upon coercion or duress, such as a claim under the Act, are not barred by *D'Oench*. It also conflicts with basic principles recognized by this Court regarding exceptions to the broad

[5] As noted, the demands made upon petitioner were, in fact, the subject of a memorandum maintained in InterFirst's files. The court of appeals' conclusion that petitioner's claims and defenses were barred because they were "based on unrecorded agreements with InterFirst" is, therefore, erroneous. App., *infra*, 6a. This petition, however, does not turn upon whether or not a "writing" existed. The *D'Oench* doctrine holds that a borrower may not bring defenses against collection efforts of a federal receiver where those defenses are based on unrecorded agreements with the failed bank. *D'Oench*, 315 U.S. at 459-60. Certain defenses have been (and should be) excluded from that doctrine – defenses such as those based upon conduct which comprises a claim under the Act. *See* pp. 9-13, *infra*. If such a defense exists, *D'Oench* does not apply and the existence, or lack thereof, of a writing is entirely irrelevant.

scope of the *D'Oench* doctrine and its statutory counterpart, 12 U.S.C. § 1823(e). The decision below also conflicts with a decision from another court of appeals which held that the *D'Oench* doctrine does not outweigh specific policies in federal legislation crafted to protect investors. Similarly, the Act is intended to protect bank customers from acts of coercion, such as economic duress. If the decision below is allowed to stand, conflicts with decisions of this Court and other courts will persist in areas of significant public interest and litigation. Moreover, by virtue of the misapplication of law and policy, bank customers who are the victims of coercive, illegal banking activity will be denied remedies provided by federal law. Because this is a recurring issue of critical importance to national banking law, this Court's review is warranted.

1. The nature of a claim under the Act is one of economic duress. The express purpose of the Act "is to prohibit anticompetitive practices which *require* bank customers to accept some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire." S. Rep. No. 1084, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 5519, 5535 (emphasis added). The Fifth Circuit has recognized this purpose. *See Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54, 58 (5th Cir. 1978). Federal tying laws[6] have their origin in antitrust and are an attempt to avoid the deleterious effects of coercive and anticompetitive

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[6] A parallel remedy for similar tying conduct by savings and loans is found in the Thrift Institutions Restructuring Act, 12 U.S.C. § 1464(q).

actions by banks. *Campbell v. Wells Fargo, N.A.*, 781 F.2d 440, 443 (5th Cir.), cert. denied, 476 U.S. 1159 (1986). The illegality of tying arrangements stems from the fact that they are inherently coercive. The Conference Report which preceded passage of the Act recognized that proscribed tying actions "result from actual coercion. . . . " Conf. Rep. No. 1747, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 5561, 5569.

Claims premised upon so-called "real defenses" should not be subject to the *D'Oench* doctrine. Such claims include fraud in the factum, illegality and duress. In *Langley v. FDIC*, 484 U.S. 86 (1987), the Court, addressing the related policies embodied in § 1823(e), noted that the FDIC "conceded at oral argument that the real defense of fraud in the factum . . . would take the instrument out of § 1823(e), because it would render the instrument entirely void. . . . " 484 U.S. at 93.

Several other courts have recognized that a claim or defense of duress – including a claim brought under the Act – will not be barred by the *D'Oench* doctrine or § 1823(e). The issue was discussed but not decided in *FDIC v. Morley*, 867 F.2d 1381, 1385 n.5 (11th Cir.), cert. denied, 493 U.S. 819 (1989). In *Morley* the court cited three cases which explicitly or implicitly concluded that claims based upon economic duress were not barred. *See FDIC v. MM&S Partners*, 626 F.Supp. 681, 684-85 (N.D.Ill. 1988) (applying § 1823(e)); *FDIC v. Balistreri*, 470 F.Supp. 752, 757-58 (E.D.Wis. 1979) (same); and *FDIC v. Linn*, 671 F.Supp. 547, 555 (N.D. Ill. 1987) (applying *D'Oench* and § 1823(e)). In *RTC v. Ruggiero*, 756 F.Supp. 1092 (N.D. Ill. 1991), the court followed *Linn, supra*, and concluded that

a defense based upon economic duress was not precluded by the *D'Oench* doctrine. *Id.* at 1094-95.[7]

The court of appeals' application of *D'Oench* to a claim under the Act is unprecedented and merits the Court's review. Respondent FDIC itself contends that the court of appeals' holding establishes a new rule of law "on an issue that arises very often. . . . " App., *infra*,

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[7] Two district courts have lumped claims under the Act into the category of voidable personal defenses, and have thus held or suggested that defenses based upon duress are barred by § 1823(e). *See Diamond v. Union Bank and Trust*, 776 F.Supp. 542, 543 (N.D. Okla. 1991); *FDIC v. Eagle Properties, Ltd.*, 664 F.Supp. 1027, 1054 n.5 (W.D. Tex. 1985). In each instance, however, these courts analyzed the subject defenses as if they were run-of-the-mill fraudulent inducement defenses which are properly barred pursuant to § 1823(e) or *D'Oench*.

There is a clear, and critical, distinction between a defense based upon duress, and one premised upon fraud. If the written instrument upon which the FDIC sues is not the product of a free will, but has instead been obtained by duress and coercion, no public policy is served by reading *D'Oench* (or § 1823(e)) to require that the instrument be enforced. *D'Oench* did not so hold. Fraudulent inducement, on the other hand, occurs where one lends him or herself to a scheme. Indeed, the FDIC correctly stated in its principal brief to the court of appeals that "[t]he key to understanding *D'Oench* is to understand that it involves lending oneself to [a] scheme or arrangement." FDIC brief, p. 9. "Lending oneself" does not contemplate involuntary acts which are the product of coercion and economic duress. This distinction was lost on the court of appeals.

28a.[8] The court of appeals has blurred the distinction between ordinary fraud and "real defenses" such as that presented by petitioner's claim under the Act. There is no policy which is served by such a broad reading of *D'Oench*. Defenses which have been excepted from doctrines such as *D'Oench* are now, for no discernible reason, swept into its grasp. By the court of appeals' decision, defenses which, if proved, would render an agreement void, will now be transformed into voidable defenses. The court of appeals' decision will result in the barring of defenses which have historically been excluded from the broad sweep of *D'Oench* and its statutory counterpart.

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[8] The court of appeals' opinion was not published and, pursuant to the rules of the Fifth Circuit, has no precedential value. This Court has often granted certiorari where the decision of a court of appeals is unpublished. *See e.g. Doe v. United States*, 487 U.S. 201 (1988); *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987). Respondent FDIC requested that the court of appeals publish its decision claiming that it met all criteria listed in the Fifth Circuit's rules for publication of opinions. App., *infra*, 24a. The FDIC advised the court of appeals that its "opinion in this case establishes a new rule of law and applies an established rule of law, the *D'Oench Duhme* doctrine, to facts significantly different from those in previous published opinions applying that rule." *Id.* at 25a-26a. Respondent also suggests that the court of appeals' opinion "concerns or discusses a factual or legal issue of significant public interest," and states that "[t]he failure to publish the opinion in this case will cause district courts to continue to have difficulties in resolving which federal policy concerns, protection of the FDIC or promoting bank competition, should take precedence." *Id.* at 27a.

2. In *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir.), cert. denied, 459 U.S. 826 (1982), the plaintiffs sued to rescind a $3 million note on the basis of common law fraud, and state and federal securities violations. The trial court held that the fraud claims were not barred by § 1823(e), but that federal common law precluded all of plaintiffs' claims. The Eleventh Circuit agreed as to the state securities and common law fraud claims, but refused to extend the federal common law rule set forth in *D'Oench* to the plaintiffs' rescission claims under the federal securities laws. The court stated "we are less confident that these federal policies behind the FDIC Act outweigh the strong policies of investor protection embodied in the securities laws." *Id.* at 874. The court declined to extend the *D'Oench* doctrine to claims of federal securities laws violations.

The court of appeals' decision here was principally based upon the decision in *Kilpatrick v. Riddle*, 907 F.2d 1523 (5th Cir. 1990), cert. denied, 111 S.Ct. 954 (1991). App., *infra*, 7a-9a. In *Kilpatrick*, the court held that even claims arising under federal statutes, such as the federal securities laws, are barred by the *D'Oench* doctrine. Judge Brown, in dissent, cited the Eleventh Circuit's decision in *Gunter*, and vigorously opposed the majority decision:

> Is the doctrine so powerful and all encompassing that nothing can stand in its way, including federal statutes protecting investors? In my judgment, the answer has to be no. There is a limit to the protection needed by the FDIC.

* * *

> The policy of fiduciary responsibility and good faith securities dealing should not be summarily overridden by the policy of assuring full information to bank regulators as reflected in the *D'Oench, Duhme* doctrine.

Id. at 1530-31 (Judge Brown, dissenting).

As in *Gunter*, this case presents a question of whether the *D'Oench* doctrine is so broad that federal statutes crafted to protect bank customers are of virtually no use. The Act was "intended to provide specific statutory assurance that the use of the economic power of a bank will not lead to . . . unfair competitive practices." S. Rep. No. 1084, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 5519, 5535.

The decision of the Eleventh Circuit in *Gunter* conflicts with those of the Fifth Circuit in *Kilpatrick* and in this case. The courts of appeals are divided on the issue of whether *D'Oench* bars not only state law claims, but also claims arising under federal statutes. There is no justification for applying *D'Oench* to federally created remedies such as those framed in the Act.[9]

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[9] It is noteworthy that since the codification of § 1823(e) in 1950 and the Act in 1970, Congress, after significant debate, passed the Financial Institutions Reform Recovery and Enforcement Act of 1989, P.L. 101-73, 103 Stat. 183 (1989) ("FIRREA"). FIRREA amended § 1823(e), and § 1972 of the Act, inter alia. Although Congress certainly had the opportunity, FIRREA did not extend the *D'Oench* doctrine or § 1823(e) so as to bar tying claims brought under the Act. Section 217 of FIRREA amended § 1823(e) to make it applicable to (i) depository institutions, not just banks, and (ii) the FDIC in its

(Continued on following page)

3. The court of appeals' decision has significant practical ramifications. The nation has suffered a rash of bank and thrift failures in recent years. This has led to an explosion of litigation involving failed, insured financial institutions. Isolated questions concerning the claims and defenses available to depositors against the FDIC have yet to be resolved. This case presents a significant unanswered question regarding the scope of the *D'Oench* doctrine. This is a recurring issue of critical present and future importance to national banking law. At present, there are no reported circuit court opinions defining the validity of claims of economic duress or tying violations against the FDIC or its transferees. In its attempt to have the court of appeals' decision published, the FDIC acknowledged that this case "concerns or discusses a

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(Continued from previous page)

capacity as receiver. Section 907(i) of FIRREA amended the Act to increase the fines authorized for violations of portions of the Act. Under accepted rules of statutory construction, Congress is presumed to know the existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 325 (1990). This includes the presumption that Congress is aware of well-established judicial construction of other pertinent existing statutes. *United States v. Jordan*, 915 F.2d 622, 628 (11th Cir. 1990), cert. denied, 111 U.S. 1629 (1991). Unless clearly shown otherwise, a newly enacted or revised statute is presumed to be harmonious with existing law and its judicial construction. *See Estate of Wood v. Com'r of Internal Revenue*, 909 F.2d 1155, 1160 (8th Cir. 1990). The Act was passed after *D'Oench* and § 1823(e). Moreover, in 1987 this Court in *Langley* recognized that § 1823(e) does not overcome the real defense of fraud in the factum. Based upon established canons of statutory construction, in view of the passage of FIRREA, Congress did not intend to extend the *D'Oench* doctrine or § 1823(e) to bar federal remedies such as those provided by the Act.

factual or legal issue of significant public interest." App., *infra*, 27a. Unless certiorari is granted to review the court of appeals' extension of the *D'Oench* doctrine, the existing split among the courts on this issue will result in significant adverse repercussions. Most basically, parties harmed by the very coercive conduct which led to the passage of the Act will be deprived of their express statutory remedies. This will effectively negate the purpose of the Act as to those victimized by banks which subsequently fail. Moreover, the decision is particularly unjust because the Act frequently provides the only remedy available to parties injured by such coercive action. There is no policy which justifies the court of appeals' extension of *D'Oench* to "real defenses," such as duress and claims under the Act.

Absent the Court's grant of certiorari, the federal courts will continue to be burdened by unnecessary litigation of these issues. Such litigation will continue to result in inconsistent conclusions on an issue of national importance. In the words of respondent FDIC, "[i]n the process, needless time, attorneys' fees, and judicial resources will be wasted on the resolution of this issue on a case by case basis." App., *infra*, 27a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1992

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1669

NCNB TEXAS NATIONAL BANK,
SUCCESSOR IN INTEREST TO
FIRST REPUBLIC BANK OF DALLAS,
SUCCESSOR IN INTEREST TO
INTERFIRST BANK OF DALLAS, N.A.,

Plaintiff-Appellee,

versus

ROBERT E. KING,

Defendant-Counter
Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE
CORPORATION AS RECEIVER FOR
FIRST REPUBLIC BANK OF
DALLAS, N.A.,

Counter-Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(CA 3 83 1673 T)

(December 10, 1991)

Before THORNBERRY, JOLLY, and SMITH, Circuit Judges.

PER CURIAM:*

This appeal arises from a suit on a promissory note and four guarantees executed by King in favor of NCNB's predecessor-in-interest, InterFirst Bank Dallas ("InterFirst"). King's pleadings and papers allege the following factual basis for recovery:

I

In 1980 InterFirst sought out King's business. He was then operating a Trailmobile franchise in Tulsa, Oklahoma. After cultivating King's business, InterFirst financed the purchase and restructuring of Glenn Brothers Trucking Company ("Glenn Brothers"). As part of the restructuring, InterFirst forced King to accept a former InterFirst employee, Garland Head, as a "turn around" expert at a $100,000 per year salary. Head proceeded to ruin Glenn Brothers through mismanagement and self-dealing. After Head had significantly increased Glenn Brothers' debt, King ordered Glenn Brothers shutdown. Subsequently, InterFirst extended further credit to Glenn Brothers on Head's instructions. InterFirst did so because it was undersecured at the time and apparently believed Head's claim that a further cash infusion would turn the company around and prevent bank losses.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

To secure his signature on the $1,065,000 note at issue here, which represented previous advances to Glenn Brothers, InterFirst falsely told King that he was already liable on the debt. As part of this same transaction, InterFirst demanded that King cease doing business with any other bank other than InterFirst, and demanded that he transfer all of the banking business of his separate company, Tulsa Trailer & Body ("TTB"), from two Oklahoma banks to InterFirst. In exchange for moving this business, InterFirst agreed not to call any of King's guarantees of Glenn Brothers' debt, and to extend those debts and guarantees.

II

In September 1983, InterFirst commenced this action against King, seeking the unpaid balance due and owing under the note and the four guarantees. King responded by asserting numerous affirmative defenses and counterclaims against Interfirst [sic]. During the pendency of this action, InterFirst merged with RepublicBank Dallas to form First Republic. Accordingly, First Republic became the owner and holder of the notes and guarantees. About a year later, First Republic was declared insolvent and the FDIC was appointed as receiver. The FDIC created a "bridge bank" known as JRB Bank, N.A., Dallas, Texas ("JRB"), and transferred the note and guarantees executed by King to JRB. NCNB then purchased an ownership interest in JRB and renamed it NCNB Texas National Bank.

The FDIC as receiver was granted leave to intervene in this action on March 1, 1989, but it was several months

before the parties were properly aligned, and the district court ultimately required NCNB to intervene. In response to NCNB's complaint in intervention, King filed a new answer and counterclaims, wherein he asserted for the first time a claim under the Bank Tying Act.[1] King asserted that the conduct of Interfirst [sic], conduct that was attributable to NCNB, was illegal under the Bank Tying Act, voided the loan and gave rise to damages.

NCNB and the FDIC then filed motions for summary judgment, relying on the statutory and common law protections afforded the FDIC and its assignees in enforcing obligations owed to a failed bank. In response to these summary judgment motions, King filed an affidavit in which he reasserted his Bank Tying Act claim.

The district court held that NCNB was entitled to summary judgment based on the loan documents and awarded the amount owed under them plus interest. The district court also granted summary judgment in favor of NCNB and the FDIC with respect to King's affirmative defenses and counterclaims. The court dismissed King's

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[1] 12 U.S.C. § 1972(1) provides, in pertinent part:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration of any of the foregoing, on the condition or requirement . . .
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than as a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

affirmative defenses and counterclaims because they were all based upon oral side agreements in violation of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), or because they were personal defenses rather than real defenses and therefore were unsupportable in the light of the federal holder in due course doctrine.

III

On appeal, King argues only that the district court erred in holding that his Bank Tying Act claim was barred by *D'Oench, Duhme* or the federal holder in due course doctrine. We conclude that the district court correctly held that King's Bank Tying Act claim was barred by the *D'Oench, Duhme* doctrine, and therefore, we affirm the district court's order and decision.[2]

King contends that he has established a Bank Tying Act claim and that it is not barred by the *D'Oench, Duhme* doctrine. King claims that as a condition for extending a call on the guarantees and to executing a new $1,065,000 note, InterFirst forced King to transfer all of his banking business generated by TTB to InterFirst. King contends that the two banks from which the business was transferred were competitors of InterFirst and that the condition was not reasonable or customary in the banking industry. King argues that InterFirst then repudiated its own agreement and called the loans it had agreed to

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[2] Because we affirm the district court based on its conclusion that the *D'Oench, Duhme* doctrine bars King's Bank Tying Act claim, we do not reach the issue of whether the federal holder in due course doctrine also bars this claim.

extend. Basically, King's claim is that InterFirst agreed to finance TTB as part of the deal, and then refused to do so. He contends that because TTB lost credit at a critical time in its expansion, he experienced losses in excess of $15,000,000. His claim is wholly dependent on oral promises made by the officers of InterFirst to King to provide financing for his other businesses.

IV

The *D'Oench, Duhme* doctrine holds that a borrower may not bring defenses against the collection efforts of the federal receiver of a failed bank, which are based on unrecorded agreements with the failed bank. *D'Oench,* 315 U.S. 447, 459-60 (1942); *Kilpatrick v. Riddle,* 907 F.2d 1523, 1526 (5th Cir. 1990), *cert. denied, Rogers v. FDIC,* 111 S.Ct. 954 (1991). The *D'Oench, Duhme* doctrine also protects the assignees of the FDIC. *Kilpatrick,* 907 F.2d at 1528; *Bell & Murphy & Assocs. v. Interfirst Bank Gateway,* 894 F.2d 750, 754-55 (5th Cir. 1990). Defenses that are framed as causes of action are also barred by the doctrine. *Kilpatrick,* 907 F.2d at 1528; *Bell & Murphy,* 894 F.2d at 753. Thus, it appears that the *D'Oench, Duhme* doctrine clearly bars King's Bank Tying Act claim because it is based on unrecorded agreements with InterFirst.

King argues that the district court's holding that the *D'Oench, Duhme* doctrine bars his Bank Tying Act claim somehow nullifies or repeals the Bank Tying Act.[3] This

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[3] In his brief, King erroneously states that the district court held that King's Bank Tying Act claim was barred by 12

(Continued on following page)

characterization of the district court's holding is inaccurate. The court's application of the *D'Oench, Duhme* doctrine did not negate the Bank Tying Act; it only held that a private claim thereunder, which is based on unrecorded agreements, cannot be asserted against the FDIC or its transferees.

This court recently addressed a similar argument in *Kilpatrick v. Riddle*, 907 F.2d 1523 (5th Cir. 1990), cert. denied, *Rogers v. FDIC*, 111 S.Ct. 954 (1991). There, the plaintiffs were seeking rescission of promissory notes they executed in favor of a bank. The bank had failed and the FDIC had acquired the notes through its capacity as receiver. The plaintiffs contended that the notes were invalid because they were obtained through fraud in violation of the federal securities laws. The defendants, the FDIC and one of its assignees, argued that the plaintiffs' claims were barred by *D'Oench, Duhme*. The plaintiffs countered that, as a policy matter, the *D'Oench, Duhme* doctrine could not trump the federal securities laws. We held that the decision in *Langley v. FDIC*, 484 U.S. 86, 91-92 (1987), extended the *D'Oench, Duhme* doctrine to bar defenses that accused the failed bank of procuring the notes through fraud. *Kilpatrick*, 907 F.2d at 1527. We further held that the *D'Oench, Duhme* doctrine

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(Continued from previous page)

U.S.C. § 1823(e). The district court's holding did not depend on § 1823(e). Most of King's arguments in his brief concern § 1823(e), but because we have held that § 1823(e) and *D'Oench, Duhme* bar similar defenses we will address his arguments as if they were also made under *D'Oench, Duhme*. *Kilpatrick*, 907 F.2d at 1526 n.4.

barred plaintiffs' claims, despite the fact that the claims were based on federal securities laws. "It is not the nature or enforceability of an agreement between a bank and borrower that controls the application of the *D'Oench, Duhme* doctrine; if the agreement is unwritten, D'Oench, Duhme applies." *Kilpatrick*, 907 F.2d at 1529.

We held that the policy underlying the doctrine mandated that result:

> It is the "federal policy to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [it] insures or to which it makes loans." *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 457, 62 S.Ct. 676, 679, 86 L.Ed. 956 (1942). This policy is undermined just as much by unrecorded representations regarding securities as by secret agreements that condition the enforceability of obligations to a federally insured bank. We must therefore conclude that claims under the federal securities laws provide no basis from which to carve an exception from the *D'Oench, Duhme* doctrine. *Kilpatrick*, 907 F.2d at 1529.

The same reasoning applies in this case. The policy of protecting the FDIC and its assignees would be undermined by allowing defenses or counterclaims based on a Bank Tying Act claim that involves an unrecorded agreement between the executor of the note and the failed bank. We therefore hold that the district court correctly

held that King's Bank Tying Act claim is precluded by the *D'Oench, Duhme* doctrine.[4]

For the foregoing reasons, the decision of the district court is

AFFIRMED.

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[4] King also argues that the district court's decision is inconsistent with this court's opinion in *Amerifirst Properties, Inc. v. FDIC*, 880 F.2d 821 (5th Cir. 1989). This court did not discuss the *D'Oench, Duhme* doctrine in *Amerifirst*. In *Amerifirst*, the bank failed and the FDIC intervened only after the case was already on appeal. *Amerifirst*, 880 F.2d at 823 n.2. The FDIC did not attempt to assert the *D'Oench, Duhme* doctrine as a defense to the plaintiff's Bank Tying Act claim. Thus, *Amerifirst* is not apposite authority in this appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NCNB TEXAS NATIONAL BANK, Successor in interest to First RepublicBank, Dallas successor in interest to InterFirst Bank Dallas, N.A.,

Plaintiff,

v.

ROBERT E. KING,

Defendant and Counter-Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for First RepublicBank Dallas, N.A.,

Counter-Defendant.

CA 3-83-1673-T

(FILED JUN 14 1990)

ENTERED ON DOCKET JUN 14 1990 PURSUANT TO F.R.C.P. RULES 58 AND 79a.

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

On March 22, 1990, the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for First RepublicBank Dallas, N.A., filed its Motion for Final Summary Judgment Pursuant to Rules 56 and 54(b). NCNB Texas National Bank ("NCNB") filed its Motion for Summary Judgment on April 12, 1990. King filed his Cross Motion for Summary Judgment on April 24, 1990.

This is an action arising out of numerous loan transactions between InterFirst Bank Dallas, N.A. and Robert King. These transactions involved four personal guaranties and one promissory note (hereinafter collectively referred to as the "loan documents"). The loan documents are as follows: (1) on February 25, 1981, King executed a guaranty that guaranteed a $1,500,000 loan contemporaneously executed by Glenn Brothers Trucking Inc. in favor of InterFirst, and a second guaranty executed on December 8, 1981 that guaranteed all of Glenn Brothers' indebtedness; (2) on November 14, 1980, King executed a continuing guaranty for all present and future indebtedness of Costal [sic] Air Brake Company, Inc., which executed a promissory note in favor of InterFirst on November 15, 1982 in the amount of $400,000; (3) on November 14, 1980, King executed a continuing guaranty for all present and future indebtedness of Compco, Inc., which executed a promissory note in favor of InterFirst on November 15, 1982 in the amount of $290,000; and, (4) on January 11, 1983, King executed a promissory note in favor of InterFirst in the amount of $1,065,000.

King subsequently defaulted on each of the obligations and InterFirst filed suit against King on September 23, 1983 seeking to recover on the loan documents. King counterclaimed against InterFirst and filed a third-party action against Garland Head.[1] In June 1987, InterFirst merged with RepublicBank Dallas, N.A., with the resulting entity named First RepublicBank Dallas, N.A.

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[1] King third party action Head was dismissed by agreement on June 10, 1988.

On July 29, 1988, the Comptroller of the Currency declared First RepublicBank insolvent and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver of First RepublicBank pursuant to 12 U.S.C. § 191. On the same day, the FDIC, in its capacity as receiver, and a bridge bank, which was established by the FDIC in its corporate capacity and was wholly owned by that agency pursuant to 12 U.S.C. 1821(i), entered into a Purchase and Assumption Agreement. The bridge bank, JRB Bank N.A., Dallas, Texas, assumed the loan documents made the subject of this action. The bridge bank was subsequently renamed NCNB Texas National Bank.

On September 18, 1989, the Court allowed NCNB to intervene in this action and realigned the parties so that NCNB became the party-plaintiff seeking to recover on the loan documents, and FDIC became the counter-defendant against the counterclaims asserted by King. NCNB filed its Complaint in Intervention on September 22, 1989 and King filed his answer and counterclaims on October 12, 1989.

NCNB's complaint essentially realleged the original complaint filed by InterFirst, asserting its right to recover under the loan documents executed by King which are in default. King asserted numerous affirmative defenses and counterclaims including: (1) alteration of the obligation without consent; (2) statute of limitations; (3) lack of consideration; (4) waiver, estoppel, unclean hands, and bad faith, (5) revocation, (6) negligent and fraudulent misrepresentations; (7) breach of contract; (8) duress; (9) mutual mistake; (10) equitable estoppel; (11) breach of fiduciary duty and mismanagement; (11) [sic] unjustified impairment of collateral; (13) negligence; (14) violation of

the Texas Deceptive Trade Practices Act; (15) usury; and, (16) violation of the Bank Tying Act.

King's defenses and counterclaims focus upon alleged oral representations made by officers of InterFirst in which he was induced to execute the loan documents. Such representations include InterFirst's representations that King would never be held personally liable on the loan documents and that InterFirst would provide King certain additional financing for other businesses owned by him. King also asserts that the promissory note was executed on the representation that it replaced other notes evidencing outstanding monies owed by King to InterFirst, when, in fact, such monies were not owed by King. Therefore, King asserts that the loan documents are void, voidable or unenforceable.

Summary Judgment

Summary Judgment should only be entered where the record establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. Proc. The movant bears the burden of establishing the propriety of summary judgment. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The substantive law will identify what facts are material. *Id.* at 248. A dispute as to a material fact is "genuine"

only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248.

The FDIC and NCNB contend that King's counterclaims and affirmative defenses, with the exception of the defense of statute of limitations, should be dismissed either under *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and 12 § 1823(e), because they are based upon oral side agreements between King and officers of InterFirst, or because they are barred by the federal holder in due course doctrine. In support of its position, NCNB contends that, as the transferee of these notes from the FDIC under the purchase and assumption agreement, it is also entitled to raise *D'Oench* and the federal holder in due course doctrine to prevent King from maintaining any affirmative defenses to the loan documents. The FDIC and NCNB also contend with respect to the only affirmative defense of King not barred by *D'Oench* or the holder in due course doctrine, statute of limitations, they are nonetheless entitled to summary judgment as such defense fails as a matter of law.

D'Oench

The *D'Oench* doctrine holds that a debtor who lends himself, no matter how innocently, to a scheme or arrangement tending to mislead bank examiners cannot raise such scheme or any condition of that scheme or arrangement as a defense against the FDIC in a suit on the note. The doctrine is a rule of estoppel that prevents those who give notes to federally insured institutions from raising defenses based on alleged side agreements made with the officers of failed banks and thrift with

regard to enforceability of promissory notes. The doctrine also applies to affirmative claims for relief. *Langley v. FDIC*, 484 U.S. 86 (1987); *Beighley v. FDIC*, 868 F.2d 776 (5th Cir. 1989). Furthermore, all claims, counterclaims and affirmative defenses barred as to the FDIC are also barred as to NCNB. *See Bell & Murphy & Associates, Inc. v. Inter-First Bank Gateway*, 894 F.2d 750 (5th Cir. 1990); *Aero Support Systems, Inc. v. FDIC*, CA 3-88-0042-W (N.D. Tex, April 27, 1989) (NCNB, as transferee of note from FDIC is entitled to raise the *D'Oench* doctrine).

Federal Holder in due Course

In *FSLIC v. Murray*, 853 F.2d 1251 (5th Cir. 1988), the Fifth Circuit adopted a federal common law holder in due course standing for the FSLIC when it acquires a negotiable instrument in a purchase and assumption transaction. The Fifth Circuit held that despite not meeting the technical requirements of a holder because the notes were acquired in bulk, the FSLIC should nevertheless be given holder in due course status to preserve the sensitive federal interests implicated when the FSLIC rescues an insolvent savings. *Id.* at 1256. The Court found that providing the FSLIC such status promotes the necessary uniformity of law while countering individual state laws that would frustrate a basic FSLIC objective of promoting confidence and stability in financial institutions. *Id.* A similar result was recently reached by the Fifth Circuit applying the holder in due course doctrine to the FDIC. *Campbell Leasing, Inc. v. Federal Deposit Insurance Corporation*, No. 89-1542 (5th Cir. May 24, 1990). In *Campbell*, the Fifth Circuit specifically rejected arguments that the FDIC should be precluded from attaining holder in due course

status because they acquired the promissory notes in a bulk transaction or had notice that the note was in default. *Campbell* also specifically provided that the holder in due course doctrine would extend to subsequent holders such as NCNB. *Id. See also FDIC v. Wisenbaker*, MO-88-CA-109 (W.D. Tex. October 26, 1988) (NCNB, as transferee of note from FDIC is entitled to holder in due course status).

The Court, having considered the FDIC and NCNB's motions for summary judgment and King's response thereto, is of the opinion that King's affirmative defenses and counterclaims for alteration of the obligations, lack of consideration, waiver, estoppel, unclean hands, and bad faith, revocation, negligent and fraudulent misrepresentations, breach of contract, duress, mutual mistake, equitable estoppel, breach of fiduciary duty and mismanagement, unjustified impairment of collateral, negligence, violation of the Texas Deceptive Trade Practice Act, usury, and violation of the Bank Tying Act, should be dismissed as they are based upon oral side agreements in violation of *D'Oench* or because they are personal defenses rather than real defenses and therefore are unsupportable in light of the federal holder in due course doctrine. Tex. Bus. & Comm. Code, § 3.305 (Vernon 1968).

Statute of Limitations

While King's affirmative defense of limitations is unclear, it appears that King contends that NCNB entry into this action to seek recovery on the loan documents in September 1989 is beyond the statute of limitations for contract actions and thus NCNB's claim is time barred.

However, this action was timely brought to seek recovery on the documents in 1983 by InterFirst and NCNB's complaint in intervention relates back to the time the suit was originally filed. *Allied Intern., Inc. v. International Longshoreman's Ass'n, AFL-CIO,* 814 F.2d 32 (1st Cir.), *cert. denied,* 484 U.S. 820 (1987).

King's Response to the FDIC's Motion
and King's Cross Motion for Summary Judgment

King's response to the FDIC's motion essentially alleges that the FDIC has no claims against King and that King seeks no relief against the FDIC. Instead, King asserts that the FDIC's transfer of the loan documents to NCNB was a transfer without recourse and that the FDIC does not have the obligation of defending the counterclaims. In support of his contention, King filed a cross motion for summary judgment seeking to dismiss the FDIC from this action and placing liability for the counterclaims with NCNB.[2]

The Court, is of the opinion that pursuant to the Purchase and Assumption Agreement transferring the loan documents from the FDIC to NCNB, the FDIC retained the defense of all claims arising from the loan

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[2] Because the Court is granting the FDIC and NCNB's motions for summary judgment, the court is of the opinion that King's cross motion for summary judgment is moot. Moreover, the cross motion is moot regardless of whether the FDIC or NCNB is the proper counter-defendant on the liabilities under the loan documents because the counterclaims are barred by the federal defenses provided under *D'Oench* and the holder in due course doctrine.

documents and is therefore the proper party-defendant to defend the counterclaims. For the reasons set forth above, the Court is of the opinion that the FDIC's motion for summary judgment should be granted and King's counterclaims should be denied.

King's Response to NCNB's Motion

King's response to NCNB's motion concedes that NCNB, as transferee from the FDIC, is a holder in due course. However, King contends that a genuine issue of material fact exists concerning his Bank Tying claim because he has submitted an unsigned letter found within the bank records which recites a factual summary of King's businesses and the loans made to them by InterFirst. King also states that the Bank Tying Claim is not overcome by *D'Oench*, or its statutory equivalent, 12 U.S.C. § 1283(e) (the federal defenses), because the Bank Tying Act, 12 U.S.C. § 1972, is of equal dignity with the federal defenses since it arises out of a federal statute. Finally, King's response does not address the propriety of dismissing the remaining affirmative defenses based upon *D'Oench* and the holder in due course doctrine.

The Court finds that King's arguments concerning his claim for violations of the Bank Tying Act are without merit. First, the very essence of King's claim concerns alleged oral promises made by the officers of InterFirst to King to provide financing for his other businesses. As for King's contention that the letter takes this transaction outside the *D'Oench* doctrine, the Court disagrees. King's affidavit submitted with the letter specifically states that the letter does not include the oral promises to lend him

additional monies. Finally, the Court is of the opinion that King's argument that the Bank Tying Act should be sustained because it is of equal dignity with the federal defenses, while novel, is without merit. King cites no authority for his position and the Court finds none. The Court does note, however, that this Court and at least one other court have held that a claim under the Bank Tying Act can be barred under the *D'Oench* doctrine. *See Raintree Southwest, Ltd. v. Federal Deposit Insurance Corp,* CA-3-85-1876-T (N.D. Tex., March 19, 1990); *Yankee Bank For Finance and Savings, FSB v. Task Associates, Inc.,* No. 88-CV-224 (N.D. N.Y. August 4, 1989).

Conclusion

The summary judgment evidence submitted by NCNB states that the principal amount due under the first and second guaranties, guaranteeing the indebtedness of Glenn Brothers, is $1,486,160.04 in principal on the $1,500,000 loan and that the accrued interest on the guaranty is $1,703,119.18 through February 26, 1990 and that interest continues to accrue at the rate of $536.67 per day and an additional $259,600.71 for overdrafts charged against Glenn Brothers by InterFirst.

The principal amount due under the third guaranty, guaranteeing the indebtedness of Coastal Air, is $224,235.15 and that accrued interest on the guaranty is $206,982.52 through February 26, 1990, with interest continuing to accrue at the rate of $74.75 per day.

The principal amount due under the fourth guaranty, guaranteeing the indebtedness of Compco, is $242,992.64 and that the accrued interest on that guaranty is

$172,733.56 through February 26, 1990, with interest continuing to accrue at the rate of $67.50 per day.

Finally, the summary judgment evidence establishes that the principal amount due under the promissory note is $1,005,000 and that the accrued interest on that note is $728,848.75 through February 26, 1990, with interest continuing to accrue at the rate of $279.17 per day.[3]

The Court finds from the summary judgment evidence submitted by NCNB, which is uncontroverted by King, that NCNB is entitled to summary judgment, as a matter of law, on the loan documents. With respect to King's affirmative defenses, the Court holds, based upon *D'Oench* and the federal holder in due course doctrine as previously set forth, that the affirmative defenses based upon the alleged oral agreements and which assert personal rather than real defenses are ineffective to preclude King's liability on the loan documents and that King's affirmative defense of statute of limitations also fail as a matter of law. The Court also find that the FDIC's motion for summary judgment, dismissing King's counterclaims should also be granted pursuant to the *D'Oench* doctrine.

It is therefore **ORDERED** that Plaintiff NCNB Texas National Bank's Motion for summary judgment is granted and that NCNB shall recover from Defendant Robert King on the loan documents more fully described above, principal in the amount of $3,217,987,54, accrued interest in the amount of $2,811,684.01 through February

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[3] In support of its Motion for Summary Judgment, NCNB has submitted the affidavit of Reggie Yates to establish the amounts due under the loan documents.

26, 1990 and continuing at the rate of $958.09 per day from February 26, 1990 until the date of this judgment and post-judgment at the rate of 8.70% from the date of this judgment until paid.

It is **FURTHER ORDERED** that Counter-Defendant The Federal Deposit Insurance Corporation's motion for summary judgment is granted and that Defendant and Counter-Plaintiff Robert King's counterclaims are dismissed with prejudice and King shall take nothing of the Federal Deposit Insurance Corporation.

It is **FURTHER ORDERED** that Defendant and Counter-Plaintiff Robert King's cross motion for summary judgment is denied as moot.

Signed this 13th day of June 1990.

/s/ Robert B. Maloney
ROBERT B. MALONEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NCNB TEXAS NATIONAL BANK, Successor in interest to First RepublicBank, Dallas, successor in interest to Interfirst Bank Dallas, N.A.,

Plaintiff,

v.

ROBERT E. KING,

Defendant and Counter-Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for First RepublicBank Dallas, N.A.,

Counter-Defendant.

CA 3-83-1673-T

(Filed June 14, 1990)

ENTERED ON DOCKET
JUN 14 1990 PURSUANT
TO F.R.C.P. RULES
58 AND 79a.

FINAL JUDGMENT

This action came on trial before the Court on Plaintiff NCNB Texas National Bank and Federal Deposit Insurance Corporation's Motions for Summary Judgment, Honorable Robert B. Maloney, District Judge, presiding,

the issues having been duly considered and a decision having been duly rendered,

It is **ORDERED** and **ADJUDGED** that Plaintiff NCNB Texas National Bank shall recover from Defendant Robert King principal in the amount of $3,217,987,54, accrued interest in the amount of $2,811,684.01 through February 26, 1990 and continuing at the rate of $958.09 per day from February 26, 1990 until the date of this judgment and post-judgment at the rate of 8.70% from the date of this judgment until paid.

It is **FURTHER ORDERED** and **ADJUDGED** that Defendant and Counter-Plaintiff Robert King's counter-claims are dismissed with prejudice and King shall take nothing of the Federal Deposit Insurance Corporation.

Signed this 13th day of June 1990.

/s/ Robert B. Maloney
ROBERT B. MALONEY
UNITED STATES
DISTRICT JUDGE

APPENDIX D

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December 20, 1991

VIA FEDERAL EXPRESS

Gilbert Ganucheau
Clerk, U.S. Court of Appeals
for the Fifth Circuit
U.S. Court of Appeals Courthouse
600 Camp Street, Room 109
New Orleans, Louisiana 70130

RE: Case No. 90-1669 in the United States Court of Appeals for the Fifth Circuit; *NCNB Texas National Bank v. Robert E. King v. Federal Deposit Insurance Corporation, as Receiver for First RepublicBank Dallas, N.A.*

Dear Mr. Ganucheau:

Our firm represents the Federal Deposit Insurance Corporation, as Receiver for First RepublicBank Dallas, N.A. ("FDIC"), the counterdefendant in the above referenced appeal. The FDIC is writing pursuant to Local Rule 47.5.2 to request that the court publish its opinion of December 10, 1991 in this case.

The opinion was not published when issued because the court noted, under Local Rule 47.5, that the issue in this case involved well settled principles of law. However, the FDIC submits that this Court should publish its

opinion due to (1) the factual and legal significance to the FDIC, a public agency, of the issue presented by this case (2) the clarification and guidance that publication of the opinion would provide to lower courts and (3) the savings in time and expense that would result by publication of this opinion. For the foregoing reasons, the FDIC respectfully requests that the court publish its opinion dated December 10, 1991 in this case.

As the court is aware, Local Rule 47.5.1 sets forth certain criteria for publication. Meeting only one of these criteria will suffice for publication. An opinion will be published, among other reasons, if it:

a. establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

b. applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

c. explains, criticizes, or reviews the history of existing decisional or enacted law; or

d. concerns or discusses a factual or legal issue of significant public interest.

An opinion will also be published for other reasons not applicable to the instant case. All four criteria listed above are present in this case, however.

It is important to FDIC jurisprudence to publish the opinion. The court's opinion in this case establishes a new rule of law and applies an established rule of law, the *D'Oench Duhme* doctrine, to facts significantly different from those in previous published opinions applying

that rule. As recognized by the court in its opinion, the *D'Oench Duhme* doctrine is a well established rule of law. To date, however, the FDIC is aware of only one or two recent district court opinions that have held that the *D'Oench Duhme* doctrine bars Bank Tying Act claims. *See E.G. Diamond v. Union Bank & Trust of Bartlesville,* No. 90-C-921-C (N.D. Okl. Aug. 30, 1991) (1991 W.L. 220569). The FDIC is unaware of any federal circuit court of appeals ever having addressed this issue. Fifth Circuit opinions concerning *D'Oench Duhme* are at the forefront of this entire area of law. They are often read, considered, and relied upon by other circuits. Since no other federal circuit court of appeals has yet had the opportunity to issue a published opinion that Bank Tying Act claims are susceptible to the *D'Oench Duhme* doctrine, the FDIC submits that the court's opinion establishes a new rule of law and applies an established rule of law to facts significantly different from those in previous published opinions applying that rule. Accordingly, this test for publication is met.

The court's opinion also explains and reviews the court's prior decision in *Kilpatrick v. Riddle,* 907 F.2d 1523 (5th Cir. 1990), *cert. denied, Rogers v. FDIC,* 111 S.Ct. 954 (1991). Indeed, the court takes almost one and one half pages out of its eight page opinion to explain the reasoning of the *Kilpatrick* case and how that same reasoning applies to the facts and claims presented in the instant case. Since the opinion in this case helps explain the supremacy of the *D'Oench Duhme* doctrine over other unrecorded federal statutory claims, FDIC submits that the opinion also meets this criteria for publication.

The third reason that the FDIC believes the opinion should be published is that the opinion concerns or discusses a factual or legal issue of significant public interest. Debtors' counsel grow increasingly sophisticated and ingenious in the counterclaims they allege in failed bank litigation to which FDIC is a party. In its many receiverships, the FDIC finds recurring instances of claims under the Bank Tying Act, particularly in Texas. In fact, there are even commentators who promote its use and advise potential claimants of the advantages of this type of cause of action. *See* Cotham and Cotham, *The Bank Tying Act: An Underutilized Tool in Seeking Redress Against Abuses by Financial Institutions*. 49 Tex. B.J. 110 (1986). Debtors' counsel are attempting to find refuge in the Bank Tying Act from published opinions holding that other types of unrecorded claims are barred under the *D'Oench Duhme* doctrine. As the court may remember, Mr. King added his Bank Tying Act claim only after it appeared that the entry of the FDIC into this case might eliminate his other twenty-six theories of recovery.

The failure to publish the opinion in this case will cause district courts to continue to have difficulties in resolving which federal policy concerns, protection of the FDIC or promoting bank competition, should take precedence. District courts will continue to face apparent conflicts in federal law when confronted by this issue. In the process, needless time, attorneys' fees, and judicial resources will be wasted on the resolution of this issue on a case by case basis. Moreover, inconsistent or conflicting opinions may result from the absence of a published opinion on this issue. Because this case involves the failure of First RepublicBank Dallas, N.A., one of the

largest bank failures in the history of America, and because the publication of the court's opinion would promote judicial economy and avoid needless expenses of time and monies by FDIC counsel in other cases where Bank Tying Act claims have been asserted, the court's opinion in this case should be published.

Accordingly, FDIC submits that the opinion of December 10, 1991 in this case meets at least four of the criteria established for publication of opinions of this court. Pursuant to this court's rules, meeting only one of these criteria will suffice for publication. In addition, the Court may publish an opinion for any other good reason. The best reason of all is to aid parties and their counsel in helping to define the contours of the *D'Oench Duhme* doctrine, the primary protection the FDIC enjoys. Those contours should expressly include within their boundaries unrecorded Bank Tying Act claims. The opinion in this case is a significant addition to the law of the Fifth Circuit on an issue that arises very often, particularly in Texas. Publication would settle the issue of whether the *D'Oench Duhme* doctrine bars unrecorded Bank Tying Act claims, potentially resulting in dismissals or summary judgments in cases presently pending in the district courts, and possibly reducing further litigation. Therefore, FDIC respectfully urges the court to publish the *King* opinion.

We appreciate in advance your agreement to forward this letter on to the court for its consideration.

Very truly yours,

/s/ Ronald R. Davis
Ronald R. Davis

RRD: jms

cc: Don Colleluori
Michael D. Mosher✓
Pat Guillot

(2)

No. 91-1630

Supreme Court, U.S.
FILED
MAY 8 1992
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In The

Supreme Court of the United States

October Term, 1991

ROBERT E. KING,

Petitioner,

v.

NCNB TEXAS NATIONAL BANK, N/K/A NATIONSBANK OF TEXAS, N.A., SUCCESSOR IN INTEREST TO FIRST REPUBLICBANK DALLAS, SUCCESSOR IN INTEREST TO INTERFIRST BANK DALLAS, N.A.,

AND

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR FIRST REPUBLICBANK DALLAS, N.A.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT NCNB IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine and principles of federal common law, as defined in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and its progeny, apply to bar claims based upon alleged oral promises and representations made by employees of a failed bank that are asserted by Petitioner as constituting violations of the Bank Tying Act, 12 U.S.C. §§ 1971-1978.

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BRIEF OF RESPONDENT NCNB IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. [Petition for Writ of Certiorari ("Pet."), Appendix ("App.") A.] The Order Granting Motions for Summary

Judgment and Final Judgment are unreported. (App. B and C, respectively).

JURISDICTION

The Fifth Circuit entered judgment on December 10, 1991. This Court extended the time for filing a petition for writ of certiorari in this matter through April 8, 1992. Petitioner filed his Petition for Writ of Certiorari on April 8, 1992. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Robert E. King ("King") states that Respondent NCNB Texas National Bank, n/k/a NationsBank of Texas, N.A., ("Respondent NCNB") did not take issue with any of the facts asserted by King in the trial court. (Pet. 3 at n. 1). While Respondent NCNB does not take issue with Petitioner's Statement in most respects, Respondent NCNB would point out the following misleading statements, omissions and inaccuracies contained in Petitioner's Statement.

In response to NCNB's Motion for Summary Judgment below, King submitted the Affidavit of Robert E. King ("King Affidavit") in Opposition to Motion for Summary Judgment. (R. Vol. 12, pp. 2874-87). Attached to the King Affidavit is an unauthenticated loan committee memorandum of InterFirst Bank, Dallas ("InterFirst"). (R.

Vol. 12, pp. 2881-87). In Petitioner's Statement to this Court, King represents that:

> [t]he facts underlying petitioner's claims and defenses based upon tying violations were memorialized in an internal InterFirst memorandum. This memorandum, which was part of InterFirst's files, described the basic terms of the agreement which petitioner was coerced to enter.

(Pet. 5)

As this Court will see from a review of the King Affidavit and the internal memorandum attached thereto, King's Bank Tying Act claims are wholly based upon oral promises not reflected in the bank's records. The King Affidavit expressly states in pertinent part that the memorandum "does not state that this agreement was being forced on me." (R. Vol. 12, p. 2878). Moreover, the memorandum attached to the King Affidavit does not contain any written conditions as alleged by King to be in violation of the Bank Tying Act that were required by InterFirst to facilitate the $1,065,000.00 Promissory Note in question, nor does the memorandum refer to any oral promises or representations.

Thus, as the district court and Fifth Circuit correctly analyzed, the linchpin of King's Bank Tying Act claim is wholly dependent upon alleged oral promises or representations made by the officers of InterFirst to King to induce him to execute the loan documents. (R. Vol. 12, p. 2922; App. A 6a). The district court held that "[t]he very essence of King's claim concerns alleged oral promises made by the officers of InterFirst to King to provide financing for his other businesses." (App. B 18a).

At the district court level King asserted numerous affirmative defenses and counterclaims including, *inter alia*, duress. (App. B 12a). However, on appeal to the Fifth Circuit, King argued only that the district court erred in holding that his Bank Tying Act claim was barred by *D'Oench, Duhme* because the district court's holding somehow nullifies or repeals the Bank Tying Act. (App. A 5a-6a). Thus, Petitioner's claims and arguments relating to economic duress were abandoned and are not properly before this Court.

SUMMARY OF ARGUMENT

The district court, as affirmed by the Fifth Circuit, correctly held that King's Bank Tying Act claims were barred by the *D'Oench, Duhme* doctrine. Like all of King's other affirmative defenses and counterclaims, his Bank Tying Act claims are based on oral representations and promises allegedly made by representatives of InterFirst. Such claims give rise to the classic application of the *D'Oench, Duhme* doctrine.

As noted in the Fifth Circuit's decision, the application of the *D'Oench, Duhme* doctrine does not negate, nullify or repeal the Bank Tying Act; it merely recognizes that a private claim thereunder, which is based on unrecorded agreements or representations, cannot be asserted against the Federal Deposit Insurance Corporation ("FDIC") or its assignees. (App. A 7a). Thus, the application of the *D'Oench, Duhme* doctrine in this case is in accord with basic principles recognized by this Court regarding the scope of the doctrine and its statutory

counterpart, 12 U.S.C. § 1823(e). Further, such application does not conflict with the policies and purposes underlying the Bank Tying Act.

REASONS FOR NOT GRANTING THE WRIT

I. THE DECISION OF THE FIFTH CIRCUIT IS IN ACCORD WITH GOVERNING STATUTORY LAW AND THE PRECEDENT OF THIS COURT

The *D'Oench, Duhme* doctrine, as originally stated, holds that when a federally insured bank fails, borrowers of the bank may not later defend against collection efforts of a federal receiver by arguing that they had an unrecorded agreement with the bank. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 459-60 (1942). In *D'Oench, Duhme*, the borrower had executed written obligations to an insured institution but claimed, after the bank failed, that the bank had orally agreed that these obligations would not be enforced. This oral side arrangement became the paradigmatic "secret agreement" barred by the doctrine enunciated in *D'Oench, Duhme*.

Since the initial statement of the doctrine in *D'Oench, Duhme*, this Court and the lower federal courts have expanded its preclusive effect well beyond the context of an oral "secret agreement" between the bank and the borrower.[1] In *Langley v. FDIC*, 484 U.S. 86 (1987), this

[1] *See, e.g., Bowen v. FDIC*, 915 F.2d 1013, 1014 (5th Cir. 1990) (alleged oral promise to extend loan barred by *D'Oench*); *Bell & Murphy & Assoc., Inc. v. InterFirst Bank Gateway, N.A.*, 894

(Continued on following page)

Court extended the doctrine to preclude a defense which is essentially the same as the affirmative Bank Tying Act claim King seeks to advance here: that the obligation to the failed bank was procured through fraud in the inducement.

In *Langley*, unwritten representations concerning the actual size of the land or the value of the mineral deposits would naturally mislead an outside examiner, who must rely on the written records of the failed institution. In the present case, it is no less true that the alleged, unwritten representations and promises would naturally mislead an outside examiner, simply because they are not reflected in the written documents contained in the bank's records. As succinctly stated by this court in *Langley*:

> Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to

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(Continued from previous page)

F.2d 750, 754 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 244 (1990) (claim that bank induced borrowers to enter into an agreement through fraudulent misrepresentation and purported breach of obligations under alleged agreement barred by *D'Oench*); *Beighley v. FDIC*, 868 F.2d 776, 784 (5th Cir. 1989) (breach of contract, breach of fiduciary duty claims barred by *D'Oench*); *First State Bank of Wayne County, Kentucky v. City & County Bank*, 872 F.2d 707, 716-17 (6th Cir. 1989) (*D'Oench* barred undisclosed oral agreement regarding option to repurchase loan participation); and *FDIC v. Gulf Life Ins. Co.*, 737 F.2d 1513, 1518 (11th Cir. 1984) (waiver, estoppel and unjust enrichment claims barred by *D'Oench* in connection with suit by FDIC on interests in credit life policies).

> a scheme or arrangement that is likely to mislead the banking authority, whether the condition consists of performance of a counter promise (as in *D'Oench, Duhme*), or of the truthfulness of a warranted fact.

Langley, 484 U.S. at 93.

This Court in *Langley* did identify one exception to the broad reach of Section 1823(e), and thus, by implication, *D'Oench*, but it is inapplicable in this case. *Langley*, 484 U.S. at 93. "Where the bank engages in fraud 'in the *factum*' rather than fraud in the inducement, there is no valid obligation on the part of the borrower under the principal that fraud vitiates consent." *Kilpatrick v. Riddle*, 907 F.2d 1523, 1527 n. 6 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 954 (1991). However, where as here, King knowingly executed a Promissory Note and Guaranty in favor of InterFirst, allegations of fraud or duress are simply allegations of fraud in the inducement. *Id.*

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS - NO OTHER CIRCUIT COURT HAS DECIDED THE ISSUE

The Fifth Circuit's decision does not conflict with any other circuit court on this issue. As King recognizes, this is the first decision by a court of appeals addressing the effect of the *D'Oench, Duhme* doctrine on a claim under the Bank Tying Act. (Pet. 8). King attempts to create a conflict among the circuits by arguing that the Eleventh Circuit in *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir. 1982), *cert. denied*, 459 U.S. 826 (1982), held that the *D'Oench* doctrine does not outweigh specific policies in

federal legislation crafted to protect investors. The only other circuit court case relied upon by Petitioner is *FDIC v. Morley*, 867 F.2d 1381 (11th Cir. 1989), *cert. denied*, 493 U.S. 819 (1989).

Petitioner's reliance upon *Gunter* and *Morley*, as resulting in a conflict with the Fifth Circuit's decision herein, is misplaced for several reasons. The most obvious reason is that neither *Gunter* nor *Morley*, squarely or in dictum, address the issue of the application of *D'Oench* to a Bank Tying Act claim. The only issue before the court of appeals in *Morley* was the district court's decision that the borrower in that case did not have standing to challenge the statutory basis for FDIC's acquisitions of his loan pursuant to 12 U.S.C. § 1823(c)(1) and (2).[2] Similarly, in *Gunter*, the issue before the court was whether alleged state and federal securities law violations and fraud claims were barred by Section 1823(e) or by federal common law. *Gunter*, 674 F.2d at 866.

The district court, *FDIC v. Gunter*, 492 F.Supp. 546 (N.D. Ga. 1980), aff'd, 674 F.2d 862 (11th Cir. 1982), *cert. denied*, 459 U.S. 826 (1982), held that, although the statutory protection of 12 U.S.C. § 1823(e) did not extend to the Gunters' fraud claim in that case, the FDIC had a

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[2] The Eleventh Circuit noted that the district court held that Section 1823(e) barred all of Morley's affirmative defenses including an alleged defense of duress. However, Morley did not pursue his argument on appeal and the Eleventh Circuit deemed such arguments abandoned. *FDIC v. Morley*, 867 F.2d at 1385 n. 5. Petitioner's reliance upon the remaining portion of the Eleventh Circuit's discussion in footnote five will be discussed by Respondent NCNB in the succeeding section.

defense to claims of fraud under a rule of federal common law which has come to be known as the federal holder in due course doctrine. 492 F.Supp. at 556. Critical to the Eleventh Circuit's discussion of the non-applicability of Section 1823(e) was its strained distinction between certain types of misrepresentations which could be construed as "agreements" and others which could not. *Gunter,* 674 F.2d at 867.

The distinction upon which the court depended in *Gunter* has now been forclosed by this Court's analysis and definition in *Langley* of the parameters of an unwritten "agreement". The court in *Gunter* did recognize that, where an obligor asserts that an oral side agreement controls the rights of the parties, those cases come squarely within the agreement language of Section 1823(e). *Id.* While the court in *Gunter* did state in dictum that " . . . we are less confident that these federal policies behind the FDIC Act outweigh the strong policies of investor protection embodied in the securities laws", the court refused to decide which policies were strongest and barred the Gunters' securities claims against the FDIC on other grounds. *Id.* at 874.

Perhaps most significantly, as recognized in *Kilpatrick,* 907 F.2d at 1528, the Eleventh Circuit's decision in *Gunter* was rendered before this Court's decision in *Langley.* The better reasoned analysis found in *Kilpatrick,* based upon this Court's definition of the term "agreement" in *Langley,* is that it is unimportant for purposes of *D'Oench, Duhme* analysis whether a case involves

securities fraud, bank tying act allegations or even RICO claims.[3] As held by the Court in Kilpatrick:

> It is not the nature or enforceability of an agreement between a bank and borrower that controls the application of the *D'Oench, Duhme* doctrine; if the agreement is unwritten, *D'Oench, Duhme* applies.

Kilpatrick, 907 F.2d at 1529; *citing D'Oench, Duhme*, 315 U.S. at 459.

Similar to the argument made by the plaintiffs in *Kilpatrick*, King contends, nevertheless, that the balancing of federal policies demands that investor protection embodied in laws relating to economic duress and securities laws outweigh federal policies behind the *D'Oench, Duhme* doctrine. (Pet. 9). The Court in *Kilpatrick* rejected that striking such a balance was required. *Kilpatrick*, 907 F.2d at 1529. Such a result is no less true in the present case for the reasons discussed by the court in *Kilpatrick*.[4]

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[3] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*

[4] The rationale for the court's conclusion in *Kilpatrick, inter alia*, was that " . . . there is a federal policy of protecting federally insured banks from the effect of unrecorded agreements. Obviously, *D'Oench, Duhme* is not designed to protect investors. The 'doctrine thus favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can.' " 907 F.2d at 1529; citing *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990).

Finally, King can find no comfort in the analysis contained in Judge Brown's dissent in *Kilpatrick*. The present case does not require that King would have had to incorporate into the loan documents language that InterFirst was not to defraud him. Rather, to assert a claim based upon alleged agreements to do business exclusively with InterFirst, King was only required to ensure that such agreements were reflected in the loan documents. *See Howell v. Continental Credit Corp.*, 655 F.2d 743, 746 (7th Cir. 1981) (*D'Oench* not applicable where document FDIC seeks to enforce facially manifests bilateral obligations); *compare Bell & Murphy & Assoc.*, 894 F.2d at 754.

Even Judge Brown in his dissent in *Kilpatrick* recognizes that the borrowers in *Langley* could have included written representations as to the amounts of land and mineral rights in the bank records. *Kilpatrick*, 907 F.2d at 1532. By failing to ensure that the bank records in the present case accurately reflect the agreements King seeks to enforce, King lent himself to a scheme or arrangement likely to mislead bank examiners or tending to have that affect. *FDIC v. Byrne*, 736 F.Supp. 727, 732-33 (N.D. Tex. 1990) and cases cited therein.

Such action falls squarely within the policy of *D'Oench* of protecting federally insured banks from the effect of unrecorded agreements. *Kilpatrick*, 907 F.2d at 1529. The "doctrine thus favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can." *Bell & Murphy & Assoc.*, 894 F.2d at 754. The *D'Oench, Duhme* doctrine does not deprive King of

federal statutes designed to protect investors and borrowers. Petitioner simply has deprived himself of certain affirmative claims by failing to protect himself in a manner required by the *D'Oench, Duhme* doctrine. *Cf. Campbell Leasing, Inc. v. FDIC,* 901 F.2d 1244, 1248 (5th Cir. 1990) (*D'Oench* doctrine did not deprive borrowers of property without just compensation where borrowers deprived themselves of certain defenses by failing to protect themselves in a manner required by *D'Oench*); *citing United States v. Locke,* 471 U.S. 84, 107-08 (1985) (upholding a federal provision extinguishing mineral interests for failure to make a timely annual filing).

III. KING ABANDONED ALL CLAIMS OF DURESS, SUCH CLAIMS ARE NOT SUPPORTED BY THE FACTS, AND THE CASES CITED IN KING'S PETITION DO NOT SUPPORT HIS POSITION

King's allegations and claims of economic duress are not before this court. The district court granted FDIC and NCNB's summary judgment motions on such claims and such claims were not the subject of King's appeal to the Fifth Circuit. (App. A 4a-6a; App. B 12a-15a, 18a-19a). Thus, King abandoned all claims of economic duress by not raising them on appeal before the Fifth Circuit. King cannot correct any error below by arguing that the nature of a claim under the Bank Tying Act is one of economic duress.

Assuming *arguendo* that such claims have been preserved, the merits of such claims are clearly unsupported by the King Affidavit submitted in response to NCNB's and FDIC's respective motions for summary judgment.

King's own articulation of such claims demonstrates that the "economic duress" alleged is not the type of "duress" recognized as a real defense under the Uniform Commercial Code or case law. First, King failed to come forward with any specific facts to support the broad conclusory allegation that he was forced to accept credit from InterFirst on the requirement that he not obtain any further credit from competitors of InterFirst or that he was forced to move his business from InterFirst's competitors to InterFirst. Second, nothing in the memorandum itself attached to the King Affidavit suggests that King was forced to accept the restructuring of loans to InterFirst. Third, King does not argue, and the facts do not suggest, that King was tricked into signing the Note or Guaranty in the belief that it was something other than a note or guaranty. Finally, King does not argue, and the facts do not suggest, that anyone at InterFirst physically forced him to sign the Note or Guaranty or threatened him if he did not.

In short, despite the label that King attempts to place on his claims, such claims do not fit the pattern of "duress" or other types of purported "real defenses" which arguably limit the broad scope of the *D'Oench, Duhme* doctrine. More importantly, the district court cases cited by King as explicitly or implicitly concluding that claims based upon economic duress are not barred by the *D'Oench* doctrine or 12 U.S.C. § 1823(e), in reality support rather than contradict or conflict with the Fifth Circuit's decision in this case. (Pet. 10). Further, none of the cases cited address the application of the *D'Oench, Duhme* doctrine to a Bank Tying Act claim.

All the cases relied upon by King were decided prior to this court's decision in *Langley*. This court's decision in *Langley* makes clear that claims, which are in essence indistinguishable from those made by the Langleys, are barred by the *D'Oench, Duhme* doctrine.

For instance, the issue before the court in *FDIC v. MM&S Partners*, 626 F.Supp. 681, 685 (N.D. Ill. 1985), was whether defendant's defenses of waiver and estoppel arose out of collateral agreement or whether such defenses were sufficiently removed from any agreement to permit their assertion. The district court in *MM&S Partners* looked to the Sixth Circuit's decision in *FDIC v. Hatmaker*, 756 F.2d 34 (6th Cir. 1985) for what it termed "the best explanation of which defenses are barred by § 1823(e)". *MM&S Partners*, 626 F.Supp. at 686. The court stated:

> There, the court found that the defendant could not use a fraud in the inducement defense under § 1823(e) because, unlike *Gunter*, the bank's fraud went to its future conduct.
>
> * * *
>
> When, however, the bank promises to perform in the future, for example, promising to lend the maker more money in the future, the promise does constitute a side agreement, governed by § 1823(e). The court must look at the 'essence' of the maker's defense to determine whether the defense really involves a side agreement . . .

MM&S Partners, 626 F.Supp. at 686-87. The *MM&S Partners* case did not address the issue of economic duress.

Regardless, its holding would bar any such theory in the present case based upon the facts which make up the "essence" of King's claims.

The Eleventh Circuit's footnote in *Morley*, 867 F.2d at 1385 n.5, creates the incorrect impression that *FDIC v. MM&S Partners*, 626 F.Supp. 681 (N.D. Ill. 1985) and *FDIC v. Balistreri*, 470 F.Supp. 752 (E.D. Wis. 1979) offer support for the argument that neither Section 1823(e) nor *D'Oench* bar claims such as duress. The court in *Balistreri* makes no mention of the application of Section 1823(e) or *D'Oench* to a claim of duress. There is no suggestion by the facts or discussion in *Balistreri* that the argument was even raised. The court had no difficulty in that case applying Section 1823(e) to bar defenses based on alleged oral promises that the borrower would incur no personal liability, but did not find it necessary to discuss Section 1823(e) in the context of the misrepresentation or duress claims made by the defendant in that case. The fact that the court disposed of such claims on the merits does not suggest that the court in *Balistreri* concluded that Section 1823(e) does not bar defenses such as duress.

FDIC v. Linn, 671 F.Supp. 547 (N.D. Ill. 1987), likewise fails to add support to King's claims herein. In *Linn*, defendants asserted both a defense of economic duress and an affirmative claim under the Bank Tying Act. While the court in *Linn*, in reliance upon a quote from *FDIC v. Powers*, 576 F.Supp. 1167, 1170 (N.D. Ill. 1983), *aff'd*, 753 F.2d 1076 (7th Cir. 1984), held that Section 1823(e) did not *alone* bar the defense of economic duress in that case, the court recognized that the broader scope of protection provided by *D'Oench*, as was used in *MM&S Partners*, should be considered. *Linn*, 671 F.Supp. at 555.

While faced with the opportunity to decide the application of *D'Oench* to both economic duress and Bank Tying Act claims, the court refused to do so holding that defendant's claims of duress and violations of Section 1972 failed on their merits. *Id.* at 555-56. For purposes of deciding this Petition, this Court should note that the court in *Linn* did suggest that Section 1823(e) would bar violations of the Bank Tying Act based on unrecorded agreements. *Id.* at 555 n. 16.

Finally, in *RTC v. Ruggiero,* 756 F.Supp. 1092 (N.D. Ill. 1991), the court noted as follows:

> It has not been conclusively resolved in the few decided cases on the issue (1) whether a defense of economic duress negates the requisite contract formative intent, so that neither . . . Section 1823(e) . . . nor the doctrine initially articulated in *D'Oench* . . . can ever come into play to begin with . . .

Id. at 1094. In adhering to the view expressed by the court in *Linn,* the court in *Ruggiero* held that the facts set out by *Ruggiero* did not satisfy the standard of legal duress. *Id.* at 1095. After reviewing the only relevant documents in the bank records relied upon by *Ruggiero,* the court held that Ruggiero could not make any mileage out of those documents to escape liability on the Note. *Id.* at 1097. Citing *Langley,* 484 U.S. at 90-92 and *Bowen v. FDIC,* 915 F.2d 1013, 1015-17 (5th Cir. 1990), the court stated that the key purpose of Section 1823(e) and *D'Oench* "is to ensure that bank regulators (including takeover government agencies such as RTC) can comfortably rely on the regulated financial institution's official records." *Ruggiero,* 756 F.Supp. at 1097. The court concluded that the scenario painted by

Ruggiero was a classic one for the defeat of the borrowers claims. *Id., citing Bell & Murphy & Assoc.*, 894 F.2d at 753-54.

This case does not present a significant unanswered question regarding the scope of the *D'Oench* doctrine as the Fifth Circuit's decision is well within its scope and this court's decision in *Langley*. The policy of protecting the FDIC and its assignees would be undermined by allowing defenses or counterclaims based on alleged Bank Tying Act violations that involve an unrecorded agreement between a borrower or obligor and the failed bank.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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